

<p>This Opinion is Not a Precedent of the TTAB</p>

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re TRAC Distribution Inc.

Serial No. 85621173

James C. Wray,
for TRAC Distribution Inc.

Margery A. Tierney, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

Before Ritchie, Masiello, and Hightower,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

TRAC Distribution Inc. (“Applicant”) seeks registration on the Principal Register of the mark TRACHEALTH (in standard characters) for the following goods, as amended: “Chia seed food supplements” in International Class 5.¹

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used in connection with its goods, so resembles the typed mark TRAC, previously

¹ Application Serial No. 85621173, filed May 9, 2012, based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

registered on the Principal Register for “dietary supplements” in International Class 5,² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Analysis

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Similarity of the Marks

The first *du Pont* likelihood of confusion factor focuses on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation

² Registration No. 2660031, issued December 10, 2000; renewed. The registered mark is in typeset form. Before November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure (TMEP) § 807.03(i) (January 2015).

and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). We begin by noting that “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data*, 224 USPQ at 751.

The cited mark is TRAC. Applicant's mark is TRACHEALTH. We find that, although Applicant's mark is presented without a space, consumers are likely to view and verbalize it as TRAC HEALTH, based on normal English pronunciation.³ *See, e.g., Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that DESIGNED TO SELL does not create a distinct commercial impression from DESIGNED2SELL). Thus, the first part of Applicant's mark, TRAC, is identical to the entirety of the cited mark. Consumers encountering Applicant's mark are likely to first notice this identical lead term. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *see also, e.g., Palm Bay Imports*, 73 USPQ2d at 1692 (stating that "veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (noting that "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered").

The similarity between the two marks also is heightened because Applicant's mark subsumes the entirety of the registered mark. *See, e.g., In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558, 559 (CCPA 1972) (WEST POINT PEPPERELL and griffin design for fabrics and linens confusingly similar to WEST POINT for woolen piece goods); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266,

³ Applicant originally applied to register the mark TRAC HEALTH but amended to eliminate the space between the two words in its October 17, 2012 Response to Office Action. We also note that the title to a page Applicant submitted from its website presents the mark as "TRACHealth." Request for Reconsideration, 4 TTABVue at 8.

1271 (TTAB 2009) (VANTAGE TITAN confusingly similar to TITAN for medical diagnostic apparatus); *In re Hepperle*, 175 USPQ 512 (TTAB 1972) (ACAPULCO GOLD for suntan lotion confusingly similar to ACAPULCO for lipstick and powder).

The second portion of Applicant's mark, HEALTH, is a common word that has a descriptive meaning in association with Applicant's applied-for goods. Descriptive or generic matter may have less significance in creating a mark's commercial impression and little weight in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion.") (quotation omitted). Here, while the second syllable of TRACHEALTH creates a degree of visual and phonetic dissimilarity between the two marks, it has little significance in distinguishing their respective meanings or commercial impressions.

For all of the reasons discussed above, we find Applicant's mark TRACHEALTH to be similar in overall commercial impression to the cited mark TRAC. Therefore, the first *du Pont* factor supports a conclusion that confusion is likely.

B. Similarity of the Goods

We next address the second *du Pont* factor, the similarity of the goods. It is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they

would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). We must look to the goods as identified in the involved application and cited registration, not extrinsic evidence of actual use. *See, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (stating that “[i]t was proper . . . for the Board to focus on the application and registrations rather than on real-world conditions”); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”).

Applicant’s goods are “Chia seed food supplements.”⁴ The goods identified in the cited registration are “dietary supplements.”

⁴ The identification of goods, which in the original application was “food supplements,” was amended several times during prosecution, the last by an Examiner’s Amendment authorized by Applicant’s counsel on June 17, 2014.

Applicant states in its brief that it attempted to change the identification to “seeds” or “chia seeds,” but the Examining Attorney refused to accept those identifications. Appeal Brief at 1, 7 TTABVue at 2. Applicant also states that it “is willing to accept any appropriate identification which the Examining Attorney may suggest.” *Id.* at 3, 7 TTABVue at 4. However, because Applicant did not request remand to the Examining Attorney, there is no basis for the Board to accept its offer. At this late juncture, moreover, Applicant would be unable to show good cause for remand. *See In re Thomas White Int’l Ltd.*, 106 USPQ2d 1158, 1160 n.2 (TTAB 2013); TBMP §§ 1205.01, 1209.04 (2014).

Applicant argues that “A food supplement is not a dietary supplement,” and that the U.S. Food and Drug Administration (FDA) “defines a food supplement as conventional foods that are not dietary supplements.”⁵ Applicant states that its chia seeds are a food and are not categorized as a dietary supplement by the FDA.⁶

Record evidence supports Applicant’s position. Applicant submitted a printout from the FDA website stating that: “FDA regulates both finished dietary supplement products and dietary ingredients. FDA regulates dietary supplements under a different set of regulations than those covering ‘conventional’ foods and drug products.”⁷ In addition, the Examining Attorney submitted a screenshot from the FDA website that reads as follows:

What is a dietary supplement?

A dietary supplement is a product intended for ingestion that contains a "dietary ingredient" intended to add further nutritional value to (supplement) the diet. A "dietary ingredient" may be one, or any combination, of the following substances:

- a vitamin
- a mineral
- an herb or other botanical
- an amino acid
- a dietary substance for use by people to supplement the diet by increasing the total dietary intake
- a concentrate, metabolite, constituent, or extract

Dietary supplements may be found in many forms such as tablets, capsules, softgels, gelcaps, liquids, or powders. Some dietary supplements can help ensure that you get an adequate dietary intake of essential nutrients; others may help you reduce your risk of disease.

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⁵ Appeal Brief at 2, 7 TTABVUE at 3.

⁶ *Id.*

⁷ Request for Reconsideration, 4 TTABVUE at 9 (from fda.gov).

⁸ November 26, 2013 Office Action at 2 (from fda.gov).

The FDA site defines a “dietary supplement” as “a product intended for ingestion that contains a ‘dietary ingredient’ intended to add further nutritional value to (supplement) the diet,” and states that dietary supplements “may be found in many forms such as tablets, capsules, softgels, gelcaps, liquids, or powders.”

Even if chia seeds would not be classified by the FDA as “dietary supplements,” differences in the way the goods are regulated is not dispositive as to a finding of relatedness. We must assess whether consumers, who might not be familiar with the details of FDA regulation, would mistakenly believe that the respective goods originate from the same source.

There is some record evidence that the terms “dietary supplement” and “food supplement” may be interchangeable in popular use, suggesting that these goods are similar or related. In particular, the Examining Attorney submitted a Wikipedia entry titled “Dietary supplement” which states that: “A dietary supplement, also known as food supplement or nutritional supplement, is a preparation intended to supplement the diet and provide nutrients, such as vitamins, minerals, fibers, fatty acids, or amino acids, that may be missing or may not be consumed in sufficient quantities in a person’s diet.”⁹

In addition, the Examining Attorney made of record at least four existing use-based third-party registrations for both “dietary supplements” and “food supplements,” although none of these registrations specifically identified chia

⁹ August 31, 2012 Office Action at 40 (from Wikipedia.org). The top of the page also states: “‘Food supplement’ redirects here.”

seeds.¹⁰ While these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they suggest that Applicant's goods and the goods identified in the cited registration are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). In this case, we find that these third-party use-based registrations support the conclusion that the goods are related.

Finally, there is web evidence that “chia seed food supplements” are used for the same purpose as “dietary supplements”: to add nutritional value to the diet. One online article discussing the benefits of consuming chia seeds states that: “Chia seed may be used in conjunction with almost any diet your doctor or nutritionist feels is necessary for your condition.”¹¹ Another article, questioning whether chia seeds are an effective weight-loss aid, states that chia seeds are “supposed to help control hunger while they enhance your diet with super-nutrients. But what’s the real story on these nutritious seeds and their ability to help you lose weight?”¹² The article goes on to state that: “The mild, nutty flavor of chia seeds makes them easy to add to foods and beverages. They are most often sprinkled on cereal, sauces, vegetables,

¹⁰ See August 31, 2012 Office Action at 6-7, 17-19, 20-22, 26-28, 29-30, 31-32, 33-34, 35-37, and 38-39. We have cited nine registrations, but they are owned by only four different entities. Multiple registrations owned by a single entity are unnecessary because they are cumulative.

¹¹ November 26, 2013 Final Office Action at 5, 7, William Anderson, “Chia Seed – The Ancient Food of the Future,” from the Living and Raw Foods website (living-foods.com/articles/chia.html).

¹² *Id.* at 12, Kathleen M. Zelman, MPH, RD, LD, “The Truth About Chia,” from the website WebMD.com.

rice dishes, or yogurt or mixed into drinks and baked goods. They can also be mixed with water and made into a gel.”¹³

Therefore, considering the record as a whole, we find the goods to be related. *See, e.g., Andrew Jergens Co. v. Sween Corp.*, 229 USPQ 394, 396 (TTAB 1986) (finding goods related and used for the same purpose, namely, to cleanse the skin); *Hollister Inc. v. Ident A Pet, Inc.*, 193 USPQ 439, 442 (TTAB 1976) (finding goods sharing the same purpose or function of identifying animals to be commercially related). Because the respective goods are related, the second *du Pont* factor also weighs in favor of a likelihood of confusion between Applicant’s mark and the mark in the cited registration.

II. Conclusion

We have considered the evidence of record as it pertains to the relevant *du Pont* factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Trademark Examining Attorney may nonetheless be applicable, we treat them as neutral.

In view of our findings that the marks are similar and the identified goods are related, we find that Applicant’s mark is likely to cause confusion with the mark in cited Registration No. 2660031 when used in association with Applicant’s goods.

Decision: The refusal to register Applicant’s mark TRACHEALTH is affirmed.

¹³ *Id.* at 13.